BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

JEFFERY W. MEHL	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,040,607
MID-KANSAS INVESTMENT, INC.	)	
Respondent	)	
AND	)	
	)	
NATIONWIDE MUTUAL INSURANCE CO.	)	
Insurance Carrier	)	

ORDER

Claimant appeals the August 12, 2008 preliminary hearing Order of Administrative Law Judge Bruce E. Moore. Claimant was denied compensation after the Administrative Law Judge (ALJ) determined that claimant had failed to sustain his burden of proof that notice of accident was provided within 10 days or that there was just cause for enlarging the notice period to 75 days.

Claimant appeared by his attorney, Randy S. Stalcup. Respondent and its insurance carrier appeared by his attorney, Jeffery R. Brewer.

This Appeals Board Member adopts the same stipulations as the ALJ, and has considered the same record as did the ALJ, consisting of transcript of Preliminary Hearing held August 1, 2008, with attachments; a deposition transcript of Mark Nelson taken August 6, 2008; a deposition of Sarah Grant taken August 6, 2008, with attachments; and the documents filed of record in this matter.

ISSUES

1. Whether claimant provided timely notice of his accidental injury. Respondent alleges that claimant failed to provide timely notice of his alleged accident within 10 days of the accident and further claimant failed to prove just cause for that lack of timely notice. Claimant argues that he told his supervisor the day after his doctors

appointment on July 26, 2007 and thus, notice was timely. Claimant's supervisor denies this allegation.

FINDINGS OF FACT

After reviewing the record compiled to date, the undersigned Board Member concludes the preliminary hearing Order should be affirmed.

Claimant worked as an auto body technician for respondent when, on July 25, 2007, his left knee popped as he stepped down from a height of 2 1/2 to 3 feet from a frame straightener onto a concrete floor. This injury, which occurred around noon or shortly after lunch was not immediately reported to respondent. Instead, claimant went to his personal physician, to an appointment already scheduled for the next day. This appointment on July 26, 2007 was with Stanton L. Barker, M.D. a partner of claimant's personal physician, David Richman, M.D. At the time of the examination, claimant complained of back pain, which he stated he had suffered his entire life, but, it had become worse the last seven to eight months. He also felt tingling in his hands and feet, pain in his neck and into his hips bilaterally, down his right leg and into his feet, with tingling into some of his toes. Claimant has been receiving treatment from a chiropractor without much help and occasionally has gone to the emergency room. Dr. Stanton recommended an MRI to aid in diagnosing the cause of his chronic pain. There is no mention in the report of the left knee injury or the alleged accident at work. Additionally, when first asked, claimant testified that he did not even remember the examination with Dr. Barker. He then admitted remembering the exam "vaguely".[1]

Claimant was next examined on July 30, 2007, this time by Dr. Richman. He complained to the doctor of diffuse arthralgia with pain in his joints, including his arms, hands, shoulders, back, legs, knees and hips. He stated this had been going on for some time. His back pain radiates into his right leg occasionally. Again, there was no mention of a work-related accident. The doctor diagnosed diffuse arthralgia, low back pain with radiculopathy and left knee pain, swelling and locking. A possible meniscus tear was diagnosed. Dr. Richman ordered an MRI of the knee.

The next examination was on August 14, 2007. At that time claimant was advised that the MRI displayed a meniscus tear in the left knee. Claimant was also diagnosed with scoliosis with chronic mid back pain. The report again fails to note an accident at work. Dr. Richman indicated in the report that a referral to Scott G. Goin, M.D. was to be scheduled.

Claimant was again examined by Dr. Richman on August 17, 2007. This report contains the first mention of a work-related injury to his left knee on July 25, 2007. The

[1] P.H. Trans. at 23.

report also describes the incident with the framing machine and indicates that claimant stated that he had experienced immediate swelling, catching, giving way and pain with walking and climbing stairs on the date of accident. Claimant had been referred to Dr. Goin for consideration of possible surgery to the left knee. The report also indicated that Dr. Goin had, that day, reviewed the MRI.

Clamant testified that he told Sarah Grant, respondent's controller, of the accident the day after his doctors' appointment. He thought it was on July 26, 2007, but later admitted he did not remember which doctor appointment or the exact date he talked to Ms. Grant. He did remember presenting her with medical documents at the time of his initial conversation with her. Ms. Grant testified that the first time claimant discussed a work-related injury to his left knee was on August 31, 2007. At that time he also presented her with certain medical documents, one of which was from Dr. Goin. She had claimant fill out an Employer's Report Of Accident, that same day, which was then forwarded to respondent's insurance company. Claimant told Ms. Grant that his injury had occurred at least 30 days before their August 31st conversation. The Employers Report Of Accident indicated a date of accident on July 25, 2007 and was partially filled out by claimant.

Claimant also testified that he had discussed the accident, the injury and possible surgery with his supervisor, Mark Nelson, respondent's body shop manager. Mr. Nelson testified the first time he was made aware of a work-related injury was after claimant had provided certain medical documents to Sarah Grant on August 31, 2007. He was not aware of a claimed accident before that date. Mr. Nelson stated that the late notice of the alleged accident made it impossible to verify or dispute the alleged accident. In fact, because of the delay in the reporting of the accident, he could not even verify that claimant was working on the framing machine on July 25, 2007. Mr. Nelson also testified that it was the responsibility of a worker to notify respondent's representatives immediately of an accident. He stated that claimant and the other workers were aware of this, although he did not go into detail as to how they would have been aware. Notices from the Workers Compensation Division were posted in both respondent's meeting room and break room.

PRINCIPLES OF LAW AND ANALYSIS

In workers compensation litigation, it is the claimant's burden to prove his or her entitlement to benefits by a preponderance of the credible evidence.[2]

The burden of proof means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.[3]

---

[2] K.S.A. 44-501 and K.S.A. 44-508(g).

[3] *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

K.S.A. 44-520 requires notice be provided to the employer within 10 days of an accident.[4]

Claimant alleges a date of accident on July 25, 2007. But, claimant's testimony in this matter can be described as vague or evasive. Claimant has difficulty remembering his doctors appointments, what he may have told the doctors, when he may have talked to his supervisors and what information he may have provided those supervisors, and when. When claimant first sought treatment, the day after the alleged accident, he failed to mention any work accident and the type of injury alleged. It was not until August 17, 2007, over three weeks after the alleged accident that claimant first told any doctor of the accident at work. Claimant's information provided to the examining physicians on July 26, July 30 and August 14, detail a multitude of complaints covering practically his entire body. Additionally, the complaint history indicates ongoing problems for weeks or months before the July 26, 2007 examination.

Claimant testified that it was the day after the original exam on July 26, 2007, that he first talked to Ms. Grant about the accident. Ms. Grant denies being told of the accident until August 31, 2007. Claimant also alleges that he provided Ms. Grant with medical reports when he first talked to her and one of those reports was from Dr. Goin. However, claimant was not referred to Dr. Goin until he saw Dr. Graham on August 14, 2007, and did not meet with Dr. Goin until after his examination by Dr. Graham on August 17, 2007.

The ALJ found claimant's notice of this accident to respondent to be untimely and this Board Member agrees. Claimant has failed to prove that he provided timely notice of this accident. The first time claimant provided notice of this accident was on August 31, 2007.

K.S.A. 44-520 goes on to say:

> The ten-day notice provision provided in this section shall not bar any proceeding for compensation under the workers compensation act if the claimant shows that a failure to notify under this section was due to just cause, except that in no event shall such a proceeding for compensation be maintained unless the notice required by this section is given to the employer within 75 days after the date of the accident . . . .[5]

Claimant provides no reason for this delay in providing notice. He simply alleges he told his supervisor after the doctors appointment and the record fails to support his testimony as to when that conversation took place. The evidence provided by respondent points to August 31, 2007 as the date notice was first given.

---

[4] K.S.A. 44-520.

[5] K.S.A. 44-520.

The Board has set out factors to be considered when determining whether there was just cause for a delay in timely notice. Although not intended as an exhaustive list, some of the factors to consider are:

(1) The nature of the accident, including whether the accident occurred as a single, traumatic event or developed gradually.

(2) Whether the employee is aware they have sustained either an accident or an injury on the job.

(3) The nature and history of claimant's symptoms.

(4) Whether the employee is aware or should be aware of the requirements of reporting a work-related accident, and whether the respondent has posted notice as required by K.A.R. 51-13-1.[6]

This accident clearly occurred, by claimant's description, as a single traumatic event of which claimant was immediately aware. The July 30, 2007 exam indicated a possible meniscus tear. By the August 14, 2007 examination, the existence of a meniscus tear had been verified by MRI. Even so, it was another 17 calendar days and 13 work days before claimant provided notice to respondent. All while claimant was alleging notice was given within two days of the alleged accident.

Finally, Mr. Nelson verified that the required notices from the Workers Compensation Division were posted in two places by respondent and claimant and other workers were aware of the notice requirements. In fact, Mr. Nelson testified "it must be immediately reported to either your immediate supervisor and/or Sarah Grant".[7]

This Board Member finds that there was not just cause for claimant's delay in providing notice to respondent of the alleged accident and the time for providing notice should not be expanded to 75 days. Therefore, claimant has failed to provide timely notice of his accident pursuant to K.S.A. 44-520 and there is no just cause for that failure. The determination by the ALJ that claimant should be denied benefits in this matter is affirmed.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[8] Moreover, this review of a preliminary hearing Order has been determined by only one Board Member,

---

[6] *Russell v MCI Business Services*, No. 201,706, 1995 WL 712402 (Kan. WCAB, Oct. 9, 1995).

[7] Nelson Depo. at 9-10.

[8] K.S.A. 44-534a.

as permitted by K.S.A. 2007 Supp. 44-551(i)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

CONCLUSIONS

This Board Member finds that the ALJ's Order should be affirmed.

DECISION

WHEREFORE, it is the finding, decision, and order of this Board Member that the Order of Administrative Law Judge dated should be, and is hereby, affirmed.

IT IS SO ORDERED.

Dated this ____ day of October, 2008.

HONORABLE GARY M. KORTE

c: Randy S. Stalcup, Attorney for Claimant
Jeffery R. Brewer, Attorney for Respondent and its Insurance Carrier
Bruce E. Moore, Administrative Law Judge